No. 85-737 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PINNEY DOCK & TRANSPORT COMPANY, LITTON INDUSTRIES, INC., LITTON SYSTEMS, INC., LITTON GREAT LAKES CORP. AND ERIE MARINE, INC.,

Petitioners,

—v.—

THE PENN CENTRAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT WITH RESPECT TO THE QUESTION PRESENTED

The question set forth in the petition (p. i), whether ". . . the Due Process Clause prohibit[s] the discharge in bankruptcy of fraudulently concealed antitrust conspiracy claims . . . ," is not presented in this case because its factual premise—that petitioners had been the victims of "fraudulent concealment"—is contrary to the findings and conclusions of both the district court and the Court of Appeals.

RULE 28.1 STATEMENT

Pursuant to this Court's Rule 28.1, the following are non-wholly owned subsidiaries and affiliates of respondent The Penn Central Corporation: The Cleveland Union Terminals Co.; The New York and Harlem Railroad Company; Pennsylvania-Reading Seashore Lines; Akron Union Passenger Depot Company; Fort Wayne Union Railway Company; Green Real Estate Company; The Lehigh and Hudson River Railway Company; New Gauley Coal Corporation; Niagara Junction Railway Company; and, Pittsburgh and Cross Creek Railroad Company. The Penn Central Corporation is not owned by any parent corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

This case involves a unanimous affirmance by the Court of Appeals of a decision by the district court (E.D. Pa., Fullam, J.; herein the "Reorganization Court"), in the exercise of its jurisdiction under Section 77 of the Bankruptcy Act (11 U.S.C. § 205 (repealed 1978))[1] over the reorganization of Penn Central Transportation Company ("PCTC"), denying an application by petitioners for an exemption or other relief from the

1 The Bankruptcy Act of 1898 was repealed, prospectively, by the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101 *et seq.* (1982), which became effective October 1, 1979.

discharge of claims effectuated by the PCTC reorganization proceedings. Petitioners had sought leave of the Reorganization Court to assert in another forum certain antitrust damage claims against The Penn Central Corporation ("PCC"), the reorganized company formed as part of the plan of reorganization of PCTC. Their extraordinary request for relief had been brought years after the PCTC plan of reorganization had been consummated and billions of dollars in reorganization securities had been distributed pursuant to the plan of reorganization to creditors and other claimants.[2] Petitioners' alleged antitrust damage claims had accrued prior to the 1978 PCTC consummation order and were based on actions allegedly taken by PCTC during the 1955-78 period.

Petitioners received the standard proof of claim and notice of claim procedures in the PCTC reorganization, but neither filed a claim on account of their alleged antitrust causes of action. Accordingly, those claims, as well as other claims which had not been filed during the PCTC reorganization proceedings, were discharged pursuant to the provisions of Section 77(f) on October 24, 1978, the effective date of the PCTC consummation order. In seeking relief years later from the discharge of their claims, petitioners contended that an exemption should be granted because PCTC and its trustees during the course of the reorganization proceedings, according to petitioners' allegations, had fraudulently concealed the existence of their claims from them. Petitioners presented their "fraudulent concealment" contentions in the context of arguments sounding in "deprivation of property without due process" and also as supporting relief under Fed. R. Civ. P. 60(b)(3) and (6). As summarized below, both the Reorganization Court and the Court of Appeals ruled that petitioners received all the notice they were due under the Constitution

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2 Prior opinions of the Reorganization Court and the Court of Appeals provide an extensive history of the complex PCTC reorganization proceedings. *See* Matter of Penn Central Transp. Co., 458 F. Supp. 1234 and 458 F. Supp. 1364 (E.D. Pa. 1978); 596 F.2d 1102, 596 F.2d 1127 and 596 F.2d 1155 (3d Cir. 1979).

and Section 77(c) of the Bankruptcy Act, that the record developed in the proceedings did not support their contentions of "fraudulent concealment" and that no showing had been made justifying equitable relief.

The Cleveland Cases

This controversy arose when petitioners Pinney and Litton, in violation of the injunctive provisions of the PCTC consummation order, attempted to prosecute antitrust damage claims against PCC in two actions brought in 1980 and 1981 in the Northern District of Ohio (hereinafer the "Cleveland Cases"). On November 9 and 10, 1982, the district court (Thomas, J.) issued decisions on PCC's motions to dismiss in the *Pinney* and *Litton* cases.[3] In those decisions, Judge Thomas (i) granted partial summary judgment to PCC, dismissing petitioners' antitrust claims against PCC alleged to be based on matters occurring after the 1978 date of the PCTC consummation order; and (ii) held that the PCTC Reorganization Court should determine whether petitioners' remaining claims against PCC (those accruing prior to the date of the consummation order) were discharged in the reorganization proceedings and whether petitioners could be permitted to prosecute them in the Cleveland Cases.

Proceedings Before the Reorganization Court

Pinney and Litton, on January 25, 1983, filed a petition in the Reorganization Court, seeking an exemption or other relief from the provisions of Section 77(f) and the consummation order which discharged and barred their claims. Two evidentiary hearings were held before Judge Fullam on Pinney's and Litton's petition. On May 22, 1984, the Reorganization Court issued its opinion denying their petition (42 B.R. 657; Pet. App. at 23a-58a). Thereafter, on June 22, 1984, that court entered its order enjoining petitioners from prosecuting their

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3 The opinion in the *Pinney* case is unofficially reported at 1982-83 Trade Cas. (CCH) ¶ 65,054 (N.D. Ohio 1982).

Cleveland cases (or any other action) based upon claims arising prior to the consummation order (Pet. App. at 59a-61a).

In denying the petition, Judge Fullam considered, *inter alia*, petitioners' contention that their due process rights had been violated because notice had been inadequate (42 B.R. at 662-66; Pet. App. at 27a-35a). After summarizing the proof of claim procedures followed in the reorganization (42 B.R. at 662-63; Pet. App. at 27a-29a) and noting that petitioners had received personal notice and the standard proof of claim forms (42 B.R. at 663; Pet. App. at 29a), Judge Fullam concluded that "it is clear that in these proceedings the petitioners received notice of the bar date which satisfied both the statutory mandate of reasonable notice and the due process clause" (42 B.R. at 664; Pet. App. at 32a). Judge Fullam analyzed at length the evidentiary record with respect to petitioners' contentions of fraudulent concealment, and made specific findings rejecting them: "Although extensive discovery was taken, it is conceded that the Trustees and their staff had no knowledge of any facts which suggested that the petitioners had antitrust claims against the Debtor" (42 B.R. at 664-65; Pet. App. at 33a); "The Trustees completed an exhaustive search of their accounting records in an effort to send notice of the proof of claim program to anyone who might have had a claim" (42 B.R. at 665 n.4; Pet. App. at 34a n.4.); and that "the Trustees and their staff properly administered the proof of claims program and performed their fiduciary duties without engaging in any improper conduct in the Plan and confirmation proceedings" (42 B.R. at 674; Pet. App. at 53a) (*see also* 42 B.R. at 665-66 & 675; Pet. App. at 35a & 54a).

Proceedings Before the Third Circuit

On their appeal to the Court of Appeals, petitioners did not contend that any of the Reorganization Court's findings were clearly erroneous under Fed. R. Civ. P. 52. Notwithstanding that position, petitioners continued to assert that their antitrust damage claims were fraudulently concealed from them during the course of the PCTC reorganization proceedings, that they

were not notified during those proceedings of the specific existence of those claims, and hence that due process required that the discharge and bar of those claims be vacated to permit petitioners to prosecute those claims in the Cleveland Cases. Petitioners also argued that they had established sufficient grounds for equitable relief under Fed. R. Civ. P. 60(b)(3) and (6). *See* 771 F.2d at 767-68; Pet. App. at 12a-13a. The Court of Appeals rejected both arguments and affirmed the Reorganization Court's decision.

Petitioners made an effort to support their contention about "fraudulent concealment" by pointing to language in a part of Judge Fullam's opinion to the effect that there was some evidence to support the theory of conspiracy and that, for purposes of his decision, a conspiracy might be assumed (42 B.R. at 670-74; Pet. App. at 43a-52a). The Court of Appeals rejected the attempt to prove far more than was warranted from that language in Judge Fullam's lengthy decision:

> "The determination of whether there was an antitrust conspiracy is before the court in the Cleveland actions, and regardless of whether there actually was a conspiracy, the issue before the court below was whether PCTC engaged in any fraud or other misconduct which prevented Pinney and Litton from filing claims prior to the consummation date. The court found no direct evidence that PCTC acted in bad faith toward either Pinney or Litton during the reorganization proceedings." (771 F.2d at 771; Pet. App. at 20a)

The only other item petitioners could offer to support their "fraudulent concealment" contentions was a June 21, 1983 decision by the court in the Cleveland Cases denying a summary judgment motion which PCC's co-defendants had brought to dismiss certain of Pinney's claims as being barred by the statute of limitations of Section 4B of the Clayton Act (15 U.S.C. § 15b). *See* 771 F.2d at 771; Pet. App. at 21a. The Court of Appeals, noting the evaluation of the record evidence

made by the Reorganization Court as well as the results of its own analysis of the record, rejected petitioners' argument:

> "We note, however, that the legal standard for viewing the evidence was quite different for the court in the Cleveland actions, than for the district court here. Rather than viewing the evidence in the light most favorable to Pinney and Litton, the court below had to determine whether they had met their burden of proving by clear and convincing evidence conduct which prevented them from filing their alleged antitrust claims. * * * The court reviewed the proof of claim program and found that the PCTC trustees and their staff engaged in no such misconduct. 42 B.R. at 674. The court also reviewed the evidence submitted by the parties and found no fraud or other misconduct by PCTC justifying relief. Id. at 675. We have reviewed the record and agree with the court below." (771 F.2d at 771-72; Pet. App. at 21a-22a)

The Court of Appeals also rejected petitioners' contentions that the standard form of notice they received during the reorganization proceedings was violative of due process because it did not advise them of the existence of their alleged antitrust claims. In applying the standards for reasonable notice under the circumstances which are set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and other decisions of this Court, the Court of Appeals in consideration of the record facts and circumstances concluded ". . . we find that Pinney and Litton received all the notice they were due under the Constitution." (771 F.2d at 769; Pet. App. at 17a)

REASONS FOR DENYING THE WRIT

The reasons set forth by petitioners for granting the writ are all grounded on twice rejected assertions that petitioners were the victims of "fraudulent concealment" during the course of the PCTC reorganization proceedings. Thus, petitioners contend that certiorari should be granted "to extinguish a dangerous precedent that allows debtors to use the bankruptcy laws to discharge claims they have fraudulently concealed" (Pet. at p. 5). Those contentions have no merit, and the question petitioners have framed for review is improper because the Reorganization Court, on the basis of its evaluation of the evidentiary record, determined the petitioners had failed to prove their allegations of fraudulent concealment, and the Court of Appeals, on the basis of its review of the record, affirmed that determination.

The decision of the Court of Appeals turned upon the factual record developed in proceedings pursuant to a now-repealed statute. The decision does not present any important legal issues under federal law. It is not in conflict with any decision of this Court or with the decision of any other federal court of appeals. Moreover, the Court of Appeals' decision was clearly correct.

A. The Question Presented By The Petition And The Reasons Set Forth In Its Support Are Based On The Erroneous Premise That Petitioners' Claims Were Not Asserted In The PCTC Reorganization Proceedings Because Of "Fraudulent Concealment"—A Premise Contrary To The Evidentiary Record And To The Findings And Conclusions Of The Reorganization Court And The Court Of Appeals

Petitioners have formulated a question and advanced arguments in its support that portray petitioners as having been improperly foreclosed from asserting antitrust damage claims in the PCTC reorganization by reason of "fraudulent concealment." Unrestrained assertions of "fraudulent concealment"

repeatedly punctuate and color the contentions set forth in the petition (*e.g.*, Pet. at pp. i, 3, 5, 7, 8, 10). The same contentions were made by petitioners in the proceedings below in the Reorganization Court and in the Court of Appeals. Both courts rejected them.

Petitioners' assertions of fraudulent concealment were litigated in the proceedings before Judge Fullam, who found against those charges upon his evaluation of the record developed at evidentiary hearings. His findings and his extensive analysis and evaluation of the record are contrary to petitioners' contentions (*e.g.*, 42 B.R. at 664-65, 666, 671, 672, 673, 674, 675, 676; Pet. App. at 33a, 35a, 46a, 48a, 51a, 53a, 54a, 57a). Since petitioners never contended on their appeal to the Court of Appeals that any of Judge Fullam's findings were clearly erroneous, they should be deemed established and petitioners bound by them.

The Court of Appeals, while noting that petitioners did "not contend that the [Reorganization Court's] factual findings are clearly erroneous" (771 F.2d at 767 n.7; Pet. App. at 13a n.7), nonetheless reviewed the evidentiary record in response to petitioners' continued assertions of fraud. As the Court of Appeals concluded: "The court below reviewed the proof of claim program and found that the PCTC trustees and their staff engaged in no such misconduct. 42 B.R. at 674. The court also reviewed the evidence submitted by the parties and found no fraud or other misconduct by PCTC justifying relief. *Id.* at 675. We have reviewed the record and agree with the court below." (771 F.2d at 771-72; Pet. App. at 21a-22a)

B. The Court of Appeals' Decision Was Correct In Holding That In Consideration Of All The Facts And Circumstances Petitioners "Received All the Notice They Were Due Under The Constitution"

In rejecting petitioners' argument that the standard form of notice they received during the PCTC reorganization proceedings was constitutionally inadequate in the circumstances, the Court of Appeals did not apply any novel theories of due

process or depart from prior decisions of this Court. The Court of Appeals' ruling on the adequacy of the notice petitioners received is firmly based upon a straightforward application of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) with, as that decision teaches, "due regard for the practicalities and peculiarities of the case." *Id.* at 314-15. The Third Circuit underscored that "the purpose of the notice requirement is to advise individuals who will be affected by the outcome of any proceeding of the impending hearing so that they can take steps to safeguard their interests" (771 F.2d at 768; Pet. App. at 13a-14a). The court's analysis and reasoning clearly show it took into account all the relevant facts and circumstances in reaching its conclusion that the standard form of notice petitioners received was "all the notice that they were due under the Constitution" (771 F.2d at 769; Pet. App. at 17a). Throughout its analysis of petitioners' due process argument, the Court of Appeals stressed the facts and circumstances shown by the record demonstrating the efforts of the PCTC trustees to ensure that all known, potential creditors—including petitioners—received an opportunity to participate in the reorganization proceedings. *See* 771 F.2d at 768; Pet. App. at 14a; and 771 F.2d at 767 n.7; Pet. App. at 13a n.7.

The Court of Appeals properly disposed of petitioners' cited authorities (upon which they rely again in the petition[4]):

> "Unlike the facts in the above cases, Pinney and Litton 1) received mail notice of the proof of claim program and the bar date, 2) chose whether or not to participate in the reorganization proceedings as to their other claims, and 3) sought relief from the district court long after the consummation of reorganization. They further admit that the trustees did not know any facts about the alleged con-

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4 New York v. New York, New Haven & Hartford R.R., 344 U.S. 293 (1953); In re Harbor Tank Storage Co., Inc., 385 F.2d 111 (3d Cir. 1967); and Reliable Co., Inc. v. Olson Construction Co., 726 F.2d 620 (10th Cir. 1984).

> spiracy. Under these circumstances, we agree with the district court that effect must be given to the policy of finality in section 77 reorganizations and we find that Pinney and Litton received all the notice that they were due under the Constitution." (771 F.2d at 769; Pet. App. at 17a)

Based on such a factual record, which petitioners cannot and do not contend is erroneous, the Court of Appeals' decision is clearly correct and in accord with prior decisions of this Court.

CONCLUSION

The petition presents no question warranting review by this Court. Its contentions reflect dissatisfaction with Judge Fullam's findings of fact, which were never challenged by petitioners as clearly erroneous and were affirmed by a unanimous Court of Appeals. No reason exists for this Court to review the findings of the two lower courts, findings which were amply supported by substantial evidence. The petition should be denied.

November 22, 1985

Respectfully submitted,

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